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No. 00-160

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
and TENASKA IV TEXAS PARTNERS, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

National Rural Electric Cooperative Association ("NRECA") is a not-for-profit national service organization representing approximately 930 rural electric cooperative members ("RECs") in 46 states providing electricity to nearly 35 million consumers. RECs are owned and controlled by the consumers they serve. Petitioner, Brazos Electric Power Cooperative, Inc. ("Brazos"), is a member of NRECA.[1]

INTRODUCTION

In order to promote the efficient use of fuel and to reduce imports, the Public Utilities Regulatory Policies Act ("PURPA") authorizes the Federal Energy Regulatory Commission ("FERC") to exempt "qualifying cogeneration facilities" from State and Federal rate and other utility regulation and to confer other valuable benefits on them. PURPA requires that the co-product of a cogeneration facility be produced for a business purpose independent from electricity production and that the co-product be "useful," that is, not merely support qualifying facility status. The Cleburne Plant produced electricity that it sold to Brazos at non-regulated rates, plus millions of gallons of water that the City of Cleburne nominally purchased for $10 per month and then poured down its sewers as waste. Applying an irrebuttable presumption that production of a common product is economically useful, the FERC held that the

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1. This brief is filed with the consent of Petitioner and both Respondents. NRECA states that this brief has not been authored in whole or in part by counsel for any party and that no person or entity, other than NRECA, has made a monetary contribution to the preparation or submission of this brief.

Cleburne Plan was a qualifying cogeneration facility without regard to Brazos' evidence. The questions presented on appeal are:

1. Where there exists a statutory and regulatory requirement that in order to obtain the benefits that Congress accords to a qualifying cogenerator the product produced by cogeneration must be useful, can an agency satisfy that requirement by conclusively presuming that where a thermal output (here, distilled water) is "common," it is useful, even in the face of a demonstration that the millions of gallons of the distilled water "sold" for $10 per month are discarded down a sewer?

2. Can an agency avoid the statutory language that requires a determination of usefulness by applying an irrational and arbitrary but conclusive presumption of usefulness to avoid the necessity for finding that which the legislature requires to be found?

ARGUMENT

NRECA supports Brazos' Petition for a Writ of Certiorari. Brazos raises significant issues of whether an agency may make statutorily required findings based solely upon the application of irrebuttable presumptions and, specifically, of whether the FERC could find that Tenaska IV Energy Partners produced a useful product under PURPA based solely on presumptions and without weighing evidence. NRECA is not collaterally attacking PURPA, but is supporting Petitioner with respect to how PURPA is being implemented and its impact on America's consumers.

If the holdings below are allowed to stand, NRECA's members — America's consumer-owned electric cooperatives — could be required to sell power to, and purchase power from, facilities like the facility owned by Tenaska. That facility had been determined by the FERC to be a qualifying facility under PURPA, notwithstanding its failure to produce a useful product.

The central purpose of PURPA's cogeneration provisions is meaningful energy conservation. Pursuant to those provisions, qualifying producers of electricity receive "PURPA benefits" when they demonstrably save fuel through the sequential use of energy by producing electricity along with a separate useful product. Upon FERC determination that such facilities are "qualifying facilities," PURPA benefits include the right for the owner of such facilities to demand that one or more electric utilities purchase the sequentially generated power. The seller is not required to price power at competitive market rates or at cost, but can require a purchase price equal to the purchasing electric utility's "avoided cost," the amount it would have cost the purchasing utility to generate the purchased power itself.

When electric utilities are compelled to make these purchases, they forego purchases from less costly sources, i.e. purchases made at lower market rates. The increased costs incurred by the purchasing utility are then passed along to consumers. Thus, determinations that particular facilities constitute "qualifying facilities" have a direct financial impact on the nation's consumers.

In the instant appeal the product at issue is distilled water purchased for a *de minimis* fee and flushed down a sewer.

By determining the product is useful and by refusing to consider contrary evidence, the Commission failed to follow congressional intent as expressed in PURPA.

Distilled water can be produced by most electric generating plants in the United States. In the instant case, the distilled water is disposed of in a sewer. Thus, the Commission's decision and the holding of the United States Court of Appeals for the Fifth Circuit affirming that decision may jointly operate — pursuant to PURPA's mandatory purchase requirements — to require electric cooperatives, other utilities and, ultimately, America's consumers, to pay for electricity from facilities that do not produce useful products and waste fuel (and, in this instance, water).

There are many so-called PURPA plants, which, in combination, already sell electricity at billions of dollars above cost and above market based rates. The holding below, if allowed to stand, can cause those sales to increase. As recognized by Judge Emilio Garza in his concurring opinion: "By establishing an irrebutable presumption that prevents it from ever examining whether a facility's co-produced energy is ever 'useful,' FERC has opened the door to facilities who [sic] meet FERC's technical requirement but defy the language and spirit of PURPA." *Brazos Electric Power Cooperative v. FERC*, 205 F.3d 235 at 252-53 (5th Cir. 2000) [footnote omitted].

Although the cogenerator in this proceeding receives a mere ten dollars per month for its "useful" water, Brazos estimates that Brazos could pay as much as $890 million for the electricity produced in sequence with that water. The very fact that only ten dollars is received demonstrates, by itself, the absence of a market for the water and that the

sale of such water does not effectively bring in incremental revenue; the fact that such water is immediately disposed down a sewer further demonstrates it is not a useful product; and the fact that Tenaska received just ten dollars per month whether it produced one hundred or one million gallons of water shows that the water was not really distilled and sold for a commercial purpose. Yet the holding below, if allowed to stand, requires Brazos to purchase electricity from Tenaska's "qualifying facility."

American electric consumers should not be required to pay above cost or above market rates for electricity not produced as intended by Congress in PURPA.

CONCLUSION

For the forgoing reasons, the writ sought by Brazos should be granted and the decision of the Fifth Circuit summarily reversed. Alternatively, the case should be set for briefing and argument.

Respectfully submitted,

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